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No. 97-1478

In The

Supreme Court of the United States

October Term, 1997

ABRAHAM PAUL KOROTKI,

Petitioner,

vs.

ATTORNEY SERVICES CORPORATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

S. TODD WILLSON
TERRI L. GOLDBERG
JULIE SEILER-MORRIS
ECCLESTON AND WOLF, P.C.
7th Floor - Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondents Thomas, Ronald & Cooper and Daniel V. Schmitt

BENJAMIN LIPSITZ
Counsel of Record
100 Church Lane
Baltimore, Maryland 21208
(410) 484-3050

JOEL C. RICHMOND
OFFICE OF JOEL C. RICHMOND
522 Equitable Building
10 North Charles Street
Baltimore, Maryland 21202
(410) 685-2225

Attorneys for Respondent Attorney Services Corporation

145810

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

STATEMENT PURSUANT TO RULE 29.6

Respondent Thomas, Ronald & Cooper, P.A., has no parent companies or nonwholly owned subsidiaries. Respondent Attorney Services Corporation has no parent companies or nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Reasons for Denying the Writ	11
I. This Court Should Not Grant Certiorari Because The Petitioner Has Misrepresented An Inconsistency With Other Circuits, Where None Exists.	11
II. This Court Should Not Grant Certiorari Because The Petitioner Has Merely Asserted That The Lower Courts Made Erroneous Factual Findings And Misapplied The Proper Rule Of Law.	13
III. Certiorari Should Be Denied Because The Decision Below Was A Plainly Correct Application Of The Fcra And Applicable Law Regarding Permissible Purposes For Which A Credit Report May Be Obtained.	17
A. The Courts Below Correctly Concluded That Plaintiff Has The Burden Of Proof.	17
B. Defendants Met The Requirements Of The Fair Credit Reporting Act.	20
Conclusion	23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Angelozzi Brothers, Inc. v. APK Development, Circuit Court for Baltimore County, case no.: 94-CV-3226 ..... 8, 9

Celotex Corp. v. Catrett, 477 U.S. at 322 20

Crowther v. Hirschman, 174 Md. 100, 197 A. 868 (1938) 17

Hansen v. Morgan, 582 F.2d 1214 (9th Cir. 1978) ... 21

Kiley v. First National Bank of Md., 102 Md. App. 317, 649 A.2d 1145 (1994) 15

Mone v. Dranow, 945 F.2d 306 (9th Cir. 1991) 21, 22

Pyles v. Goeller, 109 Md. App. 71, 674 A.2d 35 (1969) 16

Roseman v. Retail Credit Co., Inc., 428 F. Supp. 643 (E.D. Pa. 1977) 18

Sergeant Co. v. Pickett, 285 Md. 186, 401 A.2d 651 (1979) 17

Stewart v. Credit Bureau, Inc., 734 F.2d 47 (D.C. Cir. 1984) 18, 20

Contents

Page

Yohay v. City of Alexandria Employees Credit Union, Inc., 827 F.2d 967 (4th Cir. 1987) 20, 21

Zeller v. Samia, 758 F. Supp. 775 (D. Mass. 1991) ... 14, 15

Statutes Cited:

15 U.S.C. § 1681, *et seq.* 1

15 U.S.C. § 1681(b) 10, 21, 22

15 U.S.C. § 1681b(3) 12, 16, 19

15 U.S.C. § 1681(b)(3)(A) 10, 14

15 U.S.C. §§ 1681b(3)(A)-(D) 12

15 U.S.C. § 1681b(3)(E) 11, 12, 13

15 U.S.C. § 1681d(c) 18

15 U.S.C. § 1681e 18

15 U.S.C. § 1681m(c) 18

15 U.S.C. § 1681n 20

15 U.S.C. § 1681o 20

Md. Comm. Law Code Ann. § 14-1201, *et seq.* 1

Contents

Page

Rule Cited:

Supreme Court Rule 10 13

Other Authorities Cited:

Maryland Law Encyclopedia, Vol. 5A, Ch. 9, § 252 . 16

Restatement (Second) of Contracts, § 235 15

I

STATEMENT OF THE CASE

There is no cause for this Court's review of Petitioner's factual contentions, which have been rejected by the United States District Court for the District of Maryland in a comprehensive opinion and by the United States Court of Appeals for the Fourth Circuit.

The captioned appeal arises from the District Court's grant of summary judgment in favor of Defendants/Respondents Attorney Services Corporation ("ASC"), the law firm of Thomas, Ronald & Cooper, P.A. ("TRC"), and Daniel Schmitt, Esquire ("Schmitt"), an attorney at TRC (collectively, the "Defendants"), with respect to claims asserted by Plaintiff/Petitioner Abraham Paul Korotki ("Korotki") for alleged violation of the Fair Credit Reporting Act (the "FCRA") and the Maryland Consumer Credit Reporting Agencies Act (the "CCRAA") and alleged invasion of privacy. 15 U.S.C. § 1681, *et seq.*; Md. Comm. Law Code Ann. § 14-1201, *et seq.* The proceedings below commenced with the filing of Korotki's Complaint against ASC on May 9, 1994, wherein Korotki alleged that ASC obtained his "consumer credit report" without his permission and without a permissible purpose. J.A. 4, 18. Korotki sought damages of $275,000. J.A. 22-33. The District Court entered summary judgment based upon the undisputed evidence, stipulations of fact, extensive memoranda of facts and law submitted by all parties and proceedings on the record, including a lengthy hearing before the Honorable Frank A. Kaufman on December 29, 1995. The Fourth Circuit Court of Appeals affirmed the decision of the District Court on December 5, 1997.

At his deposition, Korotki testified that he entered into an oral contract with Angelozzi Brothers, Inc. ("Angelozzi"), a utility contracting company in Baltimore, for contracting work at Old Court Village ("OCV"). J.A. 497-498. OCV is a single

family housing subdivision located on land owned by Korotki and under development by Korotki and Korotki's company, APK Development Corp. ("APK"). J.A. 497-98. On or about October 17, 1991, Korotki entered into a Public Works Agreement ("PWA") with Baltimore County for the construction of public improvements at OCV. J.A. 495, 697-705. These improvements included the water and sewer mains, sanitary sewer connections, water services, storm water management facilities, roads and street lights. J.A. 698. In connection with the PWA, Korotki himself stated that he was acting both for his own personal benefit, and for the benefit of APK. J.A. 670-72, 697. Baltimore County bid the utility work required under the PWA and Angelozzi was awarded the contract as the low bidder. J.A. 495-96, 671, 811. Korotki agreed to pay the cost of Angelozzi's work under the PWA. J.A. 700.

The PWA called for Angelozzi to dig the utility trenches for the installation of the mains at OCV. J.A. 809, 1001. In a conversation on April 19, 1993, Korotki told Angelozzi (through its President, Frank Angelozzi) that Korotki wanted full compaction of the soil that was being used to refill in the utility trenches at OCV. J.A. 497. Angelozzi agreed to provide full trench compaction at OCV and quoted Korotki a cost estimate of $12,000. *Id.* Korotki testified under oath that his agreement with Angelozzi was "clear" that Korotki wanted Angelozzi to perform trench compaction at OCV "whether it was in the PWA or not." J.A. 498. Korotki agreed to pay Angelozzi $12,000 for compaction, separate and apart from the PWA, provided that Angelozzi was not required to provide trench compaction under the PWA. *Id.* Korotki offered to pay Angelozzi for the compaction work from his own personal assets by offering to give Angelozzi his 1976 Cadillac El Dorado, titled in his name, instead of cash. J.A. 498, 710-11, 817. Angelozzi claims to have performed trench compaction at OCV in full pursuant to his oral contract with Korotki. J.A. 812, 817.

Angelozzi completed the trench compaction at OCV for one-half of the original cost estimate and submitted an invoice to Korotki for $6,000. J.A. 715. Angelozzi made repeated demands for payment and even indicated that it would be forced to pursue a mechanic's lien if not paid. J.A. 817. Korotki refused to pay Angelozzi's invoice, claiming that Angelozzi did not perform the work and that compaction was required under the PWA, in any event. J.A. 499, 819. Before Angelozzi began the compaction work, however, Korotki, Frank Angelozzi and three Baltimore County Department of Public Works inspectors met at OCV and reviewed the matter. J.A. 817. The County inspectors concluded that Angelozzi was correct in asserting that it was not required to perform full trench compaction under the PWA. J.A. 818. Thus, a dispute arose between Korotki and Angelozzi: Angelozzi contended that full trench compaction was not required under the PWA; Korotki contended that trench compaction was required of Angelozzi under the PWA and that Angelozzi had failed to provide it. J.A. 499, 817.

On September 22, 1993, unable to obtain payment for its services as promised from Korotki, Angelozzi sought a mechanic's lien against OCV, Korotki's development property. J.A. 253, 391, 812. Angelozzi attempted to serve a notice of mechanic's lien on Korotki by certified mail, but the envelope was returned unclaimed. J.A. 559-60, 647. Angelozzi then turned the matter over to its regular attorneys, TRC and Schmitt, to pursue collection of the alleged debt. J.A. 253, 391. TRC and Schmitt confirmed that Korotki was the record owner of OCV and hired ASC to post the notice of the mechanic's lien at the development project. J.A. 551-555, 641-46. ASC had provided private process service for Schmitt and TRC for a number of years. J.A. 397.

Schmitt provided ASC with written instructions of how to post OCV, but when reviewing Schmitt's letter, ASC thought

the notice was to be posted at Korotki's residence. J.A. 110, 132, 641-46. On September 30, 1993, ASC tried unsuccessfully to personally serve the notice of mechanic's lien on Korotki at his house. J.A. 357, 374-75. ASC's process server claims to have spoken with Korotki and requested that he accept court documents, which Korotki refused. *Id.* The process server claims to have been cautioned by Korotki that she was trespassing and ordered off of the premises. *Id.* The process server's access to Korotki's house was barred by a locked iron gate that blocked the sole entrance to the house across a bridge. J.A. 357, 482, 730. "No Trespassing" and "Beware of Dog" signs were posted on the iron gate surrounding Korotki's house. J.A. 379. Unable to serve Korotki personally, the process server posted the notice on the iron gate surrounding Korotki's house. J.A. 357, 381, 727. Korotki later removed the envelope containing the notice of mechanic's lien and gave it to his attorney, apparently within 90 days after the completion of work by Angelozzi. J.A. 485-87.

When Schmitt learned that Korotki's residence had been posted rather than OCV, Schmitt directed ASC immediately to post the notice at OCV and obtain personal service of the notice on Korotki. J.A. 572. The statement in Korotki's Petition that Schmitt conceded that the time for serving the notice had long expired under Maryland law does not correctly reflect the record of the case. Petition, p. 6. Schmitt testified in deposition that he believed, based on Maryland law, that the Court would consider all efforts to serve notice on Korotki, including efforts undertaken more than 90 days after Angelozzi's completion of work at OCV based on the particular facts of this case. J.A. 573-75, 627-28. Schmitt referred Korotki's counsel to a Maryland Court of Special Appeals case that supported Schmitt's belief and produced a copy of the opinion from his file at his deposition. J.A. 627-28.

Similarly, the statement in Korotki's Petition implying that APK was the owner of record of OCV in 1993 does not correctly reflect the record of the case. Petition, p. 6. Korotki himself testified under oath in deposition that he owned OCV continuously, in fee, from 1976 to August 25, 1995, the date of his deposition. J.A. 436-37. In addition, Schmitt confirmed that Korotki was the owner of record of the real estate on which OCV is situated from several official sources, including the recorded property deed, the development plan for OCV on record with the County and the County tax rolls. J.A. 551-55. Further, the statement in Korotki's Petition that the evidence shows that there was never a need to serve Korotki does not correctly reflect the record nor Maryland law. Petition, p. 4. Korotki testified that he owned the OCV property. J.A. 436-37. Maryland law requires service of the notice of intent to lien on the property owner. Md. Rule Prop. Code Annot. § 9-104.

On October 8, 1993, after Schmitt advised ASC that the wrong property had been posted, ASC immediately posted the mechanic's lien notice at OCV and attempted personal service on Korotki at his residence. J.A. 357. As before, the process server could not gain access to Korotki's house, so she posted another copy of the notice on Korotki's gate. J.A. 378, 382. A few days later, ASC returned to Korotki's residence and left a note requesting that Korotki call ASC to arrange for delivery of a court document at his convenience. J.A. 358, 383. When ASC returned a few days later to re-attempt service, the note had been removed. J.A. 358. A similar note was left in its place by ASC. J.A. 358. Eventually, Korotki called ASC and was told that ASC had an important court document for him. J.A. 776. Korotki said he would make arrangements to pick it up, but he never did. *Id.*

ASC also attempted service at an office where Korotki previously had conducted his law practice, but found only a

building advertised for sale with no one present. J.A. 358. Korotki's house and office having proved impossible locations for personal service of the notice of mechanic's lien, ASC increased its efforts to serve Korotki at OCV. J.A. 378. Near around-the-clock efforts were undertaken by ASC to serve Korotki. J.A. 359, 377-78. Between October 30 and December 20, 1993, ASC made twenty-three separate attempts to serve Korotki. J.A. 59, 121, 377-78. All efforts were unsuccessful.

In October of 1993, ASC was running out of places to attempt service on Korotki. ASC asked Schmitt to review his file for an alternative address, but Schmitt's file reflected no further information. J.A. 732. ASC and/or Schmitt obtained Korotki's motor vehicle report, report of judgments, development plan for OCV and tax bill, but they contained no new information. J.A. 585, 597, 655-59, 743. Under the circumstances, ASC told Schmitt, "we have no place to go from here [to serve Korotki]," "we are . . . at ground zero." J.A. 742-43. Schmitt told ASC to obtain any available information that offered the slightest glimmer of hope of locating a serviceable address for Korotki. J.A. 732. On October 25, 1993, ASC obtained APK's corporate information report from the State Department and Korotki's credit report from Equifax Credit Information Services. J.A. 523 735-38, 825, 827. ASC is licensed by the State of Maryland as a collection agency and is permitted to access credit reports. J.A. 747. ASC recalls that Schmitt specifically requested that ASC obtain Korotki's credit report; Schmitt does not recall specifically one way or the other. J.A. 393, 732, 944.

ASC's purpose for accessing the reports was to obtain a new address to serve Korotki with the mechanic's lien notice since ASC's repeated service attempts had failed up to that point. J.A. 760. The statement repeated throughout Korotki's Petition, that ASC admitted that it did not need the credit report to locate

a service address for Korotki, does not correctly reflect the record of the case. The record is replete with evidence that ASC made multiple unsuccessful attempts at service at each address that ASC had for Korotki, but that Korotki's house was gated, his office was vacant, Korotki could not be located at OCV and he did not respond to requests to accept service. J.A. 356-86. ASC's inability to serve Korotki after multiple attempts is the basis for ASC's belief that it needed a serviceable address for Korotki. J.A. 738, 748. ASC had used credit reports to obtain alternative addresses for service of process in the past and, therefore, knew that such reports contained useful information in regard to service. J.A. 719-20, 735-37. The record reflects that ASC anticipated finding information in Korotki's credit report to assist with service, such as the name of a business where Korotki was an officer. J.A. 744. ASC would then check the telephone book for a business address at which to serve Korotki. J.A. 744. ASC even could have derived helpful information from an abbreviated business name. J.A. 744. If that information was not contained in the report, then ASC could contact companies listed in the credit report that recently inquired into Korotki's credit history and request an address from that source. J.A. 524-25, 744-45. One of ASC's employees is very familiar with whom to contact in that regard. *Id.*

ASC reviewed the addresses for Korotki contained in the corporate information report and credit report and ascertained that the reports contained no new addresses where service might be attempted. J.A. 742-44, 748. A few days later, ASC sent both reports to Schmitt by facsimile and made no further use of the reports and, in fact, destroyed them. J.A. 752, 944, 1207-10. Schmitt made no use of the credit report. J.A. 396. Neither party further disseminated the information contained in the report. J.A. 594, 511. Korotki's counsel admitted at the motions hearing in the trial court that he had "[n]o evidence on that point" to contradict the Defendants' assertion. J.A. 268.

Personal service on Korotki of the notice of mechanic's lien never was effectuated and on January 3 or 4, 1994, Schmitt advised ASC to discontinue its efforts to serve Korotki, which by then had become futile. J.A. 595-96. Unable to complete service of the mechanic's lien notice, Angelozzi filed a breach of contract action against APK in state district court to recover its $6,000 fee for trench compaction at OCV. (*Angelozzi Brothers, Inc. v. APK Development*, Circuit Court for Baltimore County, case no.: 94-CV-3226.) J.A. 712-14. Korotki, individually, and APK filed counter-claims against Angelozzi for alleged negligence, third-party beneficiary, breach of contract, and misrepresentation regarding the PWA and Angelozzi's alleged failure to provide trench compaction. J.A. 668-96. Korotki and APK sought over $2 million in damages from Angelozzi and transferred the case to the circuit court. *Id.* Korotki alleged in that case that he entered into the PWA "acting on his own behalf and on behalf of A.P.K. [Development]." J.A. 670. Korotki and APK also alleged claims against Baltimore County, various employees of the Department of Public Works of Baltimore County, other contractors at OCV and the bonding company for the PWA. J.A. 668-96. Korotki claimed that he personally, as well as APK, suffered millions of dollars in damages from Angelozzi's alleged negligence and breach of contract at OCV. *Id.*

The statements throughout Korotki's Petition that Angelozzi "failed to perform the required compaction," that "Angelozzi was already paid in full to perform this compaction," that Angelozzi "never established any collectible debt . . . ," and "frivolous claims by a contractor who has already been paid for work never performed" grossly misstate the record and are disingenuous, at best. Petition, pp. 6, 16, 20. *Angelozzi Brothers, Inc. v. APK Development* was tried for seven days in August of 1996 and the jury returned a verdict in favor of

Angelozzi on all claims and against Korotki and APK on all counter-claims.[1]

In November of 1993, while refinancing his residence, Korotki authorized the mortgage company to obtain his credit report and in that way learned of ASC's prior credit inquiry, which was indicated on the report. J.A. 472-73. Although Korotki initially testified in deposition that the mortgage company "demanded an explanation" of the ASC inquiry, Korotki later acknowledged that the mortgage broker was his son. J.A. 472-76. Korotki testified that he sustained no out-of-pocket damages from ASC's credit inquiry, save a few long distance phone calls. J.A. 440-42, 452-53. Korotki believed, however, that two credit card issuers turned down his applications due to the reference to ASC's inquiry on his credit report. J.A. 453. Korotki was not informed by the credit card companies of the reason for the rejection of his applications and obtained several credit cards a few months later. J.A. 449-51.

At the conclusion of discovery, ASC filed a motion for summary judgment. J.A. 48-71. Based upon Korotki's own sworn testimony evidencing the oral contract between Korotki and/or his company and Angelozzi, as well as other facts in the record, the District Court found that Angelozzi had reason to believe that a business relationship existed between Angelozzi and Korotki and/or APK. J.A. 1340, 1343. On the same bases, the District Court concluded that Angelozzi was entitled to attempt to collect the debt arising from Korotki's admitted refusal to pay the fee charged under the oral contract, and to retain counsel to assist Angelozzi with collection. J.A. 1343. Citing the statutory provision expressly authorizing the furnishing of a consumer report ". . . in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving . . . collection of an

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1. The verdict in *Angelozzi Brothers, Inc. v. APK Development* was not part of the record before the District Court on summary judgment, as the case was pending when the District Court ruled.

account of the consumer" (15 U.S.C. § 1681(b)), the District Court correctly ruled that ASC had a permissible purpose under the FCRA to obtain Korotki's credit report. J.A. 1338-39.

The statement in Korotki's Petition implying that the District Court entered summary judgment in spite of factual questions raised by the record does not correctly reflect the record of the case. Petition, p. 7. The Judge's statements were made within the first few moments of a motions hearing that lasted more than four hours, during which the Court painstakingly resolved each and every fact issue by party stipulation or by ordering the filing of various memoranda setting forth the evidence and discovery documents. J.A. 251-3, 263-64, 268, 291-96. Further, during the six months between the hearing and the entry of summary judgment in favor of the Defendants on June 12, 1996, the District Court provided all parties with numerous opportunities to supplement the factual record of the case. J.A. 344-51, 1332-33.

Korotki appealed the District Court's grant of summary judgment to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's holding that Korotki's credit report was obtained for a permissible purpose under the FCRA. The Court of Appeals affirmed the District Court's holding that Angelozzi's attempt to collect an account owed by the consumer under § 1681(b)(3)(A) was a permissible purpose for obtaining the report and that the Defendants' efforts to obtain an alternate address at which to serve Korotki was a "legitimate business need" for the information in connection with a business transaction involving Korotki. J.A. 1342-43. The Court of Appeals, like the District Court, noted that the facts admitted by Korotki established a business relationship between the parties which gave rise to the permissible purpose for obtaining his credit report. Petition, A-5.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE PETITIONER HAS MISREPRESENTED AN INCONSISTENCY WITH OTHER CIRCUITS, WHERE NONE EXISTS.

Korotki's contention that certiorari should be granted because the Fourth Circuit Court of Appeals "ignored the opinions of all other circuits" is plainly incorrect. Petition, p. 11. Both the District Court and the Court of Appeals examined and relied upon the decisions of numerous circuits, including those that the Petitioner relies upon, in determining that the Defendants were entitled to summary judgment in this case.

Korotki attempts to demonstrate that the Court of Appeals diverged from the opinions of the other Courts of Appeal in regard to two determinations that the Court made. First, Korotki alleges that the Court of Appeals reversed the burden under the FCRA by requiring consumers to prove a bad faith misuse of their credit report in order to recover damages under the FCRA. Second, Korotki alleges that the Court of Appeals diverged from the opinions of the other Courts of Appeals in adopting a broad reading of "a legitimate business need" for the procurement of consumer reports under § 1681b(3)(E) of the FCRA.

The Court of Appeals applied existing law regarding the FCRA, as interpreted by other Circuits, in determining that Korotki's consumer report was obtained for a permissible purpose. The District Court did not reverse the burden of proof regarding permissible purposes for which a credit report may be obtained, as discussed below in Section III (A). The District Court properly applied the rule that the plaintiff bears the burden

of proof to the FCRA. Korotki made his "reversal of burden" argument at the District Court level and the Court of Appeals level, with no success. Without citing any law for his contention that the Defendants bear the burden of proving a permissible purpose, Korotki now asserts that the courts below improperly shifted the burden. This unsupported assertion does not give rise to a compelling reason for granting a Writ of Certiorari in this case.

Korotki's second alleged inconsistency with other Circuits relates to the definition of a "legitimate business need" under § 1681b(3)(E) of the FCRA. Section 1681b(3)(E) authorizes a person to obtain a consumer's credit report when that person "has a legitimate business need for the information in connection with a business transaction involving the consumer." As noted in the District Court's opinion, courts have interpreted § 1681b(3)(E) in different ways. Some courts have adopted a restrictive approach, concluding that the business need exception is satisfied when it relates to one of the other specifically enumerated transactions in §§ 1681b(3)(A)-(D). J.A. 1341-42. Other courts have adopted a less restrictive interpretation of that section, concluding that the business need exception is a basis distinct from the enumerated transactions. *Id.*

Korotki argues that the Circuit Court applied a broad interpretation of § 1681b(3), contrary to the rulings of the other Circuits. Despite Korotki's assertions, neither the District Court or the Court of Appeals adopted the broad interpretation of legitimate business need. The courts below found it unnecessary to address the Fourth Circuit's interpretation of § 1681b(3)(E) because it was irrelevant to the decision in this case. As stated in the District Court's Opinion,

> *even under the narrowest interpretation of § 1681b(3)(E), Defendants in this case had a*

> *permissible purpose to obtain Korotki's consumer report because the business transaction involved here related to § 1681b(3)(A), one of the other purposes specifically enumerated by § 1681b(3), which authorizes a person attempting to collect an account of a consumer to obtain the consumer's credit report.*

J.A. 1342 (emphasis added). The Court of Appeals affirmed that Angelozzi, through his attorney, was seeking to collect an account owed by Korotki, which is a permissible purpose.

The courts below relied on the decisions of other circuits in their determination that a permissible purpose for obtaining Korotki's credit report existed. The result in the case below is not in conflict with the decisions of other circuits; therefore, this Court should deny the Petition for Writ of Certiorari.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE PETITIONER HAS MERELY ASSERTED THAT THE LOWER COURTS MADE ERRONEOUS FACTUAL FINDINGS AND MISAPPLIED THE PROPER RULE OF LAW.

Korotki's true disagreement with the decisions of the District Court and the Court of Appeals lies not in the interpretation of § 1681b(3)(E), but in the application of the statutory language to the facts that Korotki himself admitted. Rule 10 of the Supreme Court Rules specifically states that "a Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Although characterized as an inconsistency among the circuits, the crux of Korotki's argument is that the courts below misapplied the law to the facts. Korotki

repeats throughout the Petition his insistence that there was no business relationship, credit transaction or debt between Korotki and Angelozzi, and no need for Defendants to obtain his credit report.

Korotki's own testimony proves his and APK's business relationship with Angelozzi. A party to a credit transaction has a permissible purpose to obtain the other party's credit report. In *Zeller v. Samia*, 758 F. Supp. 775 (D. Mass. 1991), the parties purchased a beach cottage, at which time plaintiff Zeller gave defendant Samia a promissory note for the down payment. Ten years later, Samia filed an action to partition the property, the parties' relationship having soured. When Samia re-discovered the old, allegedly unpaid note, he demanded payment. Zeller failed to pay and Samia reported a charge-off to the credit bureau. *Id.* at 777. Samia made several credit bureau inquiries, in response to which he received Zeller's credit report. *Id.* Zeller claimed that Samia used the report against him in the partition action. *Id.* The Court held that Samia's use of Zeller's credit report "to further assist him in the *collection of the alleged debt owed by the plaintiff*" was permissible under FCRA § 1681b(3)(A). *Id.* at 781 (emphasis added).

The collection of the alleged debt owed by Korotki to Angelozzi arising out of the business relationship between Angelozzi and Korotki and/or APK is based on Korotki's own undisputed testimony. Korotki testified in deposition that on April 19, 1993, he told Angelozzi to perform full trench compaction at his development project, OCV. J.A. 497. Korotki explicitly agreed with Angelozzi that Angelozzi was to perform trench compaction at OCV whether or not it was called for in the PWA. J.A. 497-98. Korotki testified that Angelozzi quoted him a price of $12,000 for the trench compaction, and Korotki agreed to pay Angelozzi, provided that Angelozzi was not required to provide trench compaction under an agreement that

Korotki had with the County, the PWA. *Id.* Korotki testified that he offered to pay Angelozzi for the compaction from his own personal assets by offering to give Angelozzi his 1976 Cadillac El Dorado, titled in his name, instead of cash. J.A. 498, 710-11, 817.

Angelozzi claimed to have performed the trench compaction and sent an invoice demanding payment for its services. J.A. 816. Korotki stated, and it is undisputed, that he refused Angelozzi's demands for payment. J.A. 819. Based on this testimony, and applying the reasoning of *Zeller v. Samia, supra*, the Defendants had a permissible purpose to obtain Korotki's credit report to collect Korotki's "alleged debt" to Angelozzi.

Korotki's argument below, that Angelozzi had no "existing business relationship" with him nor APK after July 9, 1993, is nonsense. Korotki's Brief, p. 29. July 9, 1993, is the date on which Angelozzi completed the trench compaction at OCV. J.A. 648. Korotki's theory is that his business relationship with Angelozzi ended when Angelozzi completed work on Korotki's project and Korotki decided not to pay him. J.A. 318-20, 1006. Korotki's counsel admitted in argument on the Defendants' motion for summary judgment that there had been a contract and that there was a claim, but argued that contract was "performed or breached" prior to the credit inquiry. *Id.* According to Korotki, the uncured breach of contract terminated the business relationship with Angelozzi. *Id.*

A contract is a set of promises, in this case, to perform construction services and to pay. *Kiley v. First National Bank of Md.*, 102 Md. App. 317, 333, 649 A.2d 1145, 1152 (1994). The business relationship that arises out of a contract does not summarily end when one party decides to not to pay the other. A contractual duty is discharged by nothing less than full performance. Restatement (Second) of Contracts, § 235.

Maryland courts often rely on the Restatement (Second) of Contracts. *See Pyles v. Goeller*, 109 Md. App. 71, 674 A.2d 35 (1969). Once a contract has been fully performed by one party, it cannot be terminated by the other party. *Maryland Law Encyclopedia*, Vol. 5A, Ch. 9, § 252. Yet that is precisely what Korotki argued in this case: that as soon as Angelozzi completed its work at OCV, the business relationship was over. J.A. 318-20. The District Court correctly rejected this incorrect statement of Maryland law and entered summary judgment for the Defendants based on the undisputed evidence of a credit transaction between Korotki and/or APK and Angelozzi. J.A. 1343.

The District Court applied the proper rule of law to the facts of this case, holding that even under a restrictive interpretation of § 1681b(3), the Defendants had a permissible purpose for obtaining Korotki's credit report because the Defendants were attempting to collect an account. J.A. 1342. The District Court's decision was based upon the evidence put forward in the case — primarily Korotki's own testimony regarding the transaction with Angelozzi. The District Court stated that

> it is undisputed that Korotki offered to pay Angelozzi for certain construction services. Furthermore, Angelozzi had at least some reason to believe Korotki and/or APK owed him a debt. Those facts indicate a credit transaction and are sufficient to create a permissible purpose under the FCRA.

J.A. 1345. The Court of Appeals noted that "[o]bviously, these admitted facts created a business relationship between the parties, and Angelozzi correctly believed this to be true." Petition, A-5. Korotki disagrees with the District Court's reliance on his own testimony; however, Korotki himself has articulated that a credit

report may be obtained for purposes of collection of an account of a customer. Petition, p. 10.

Since Korotki's arguments are based on an alleged misapplication of the law to the facts, he has failed to assert a compelling reason for this Court to grant certiorari and his request for a Writ of Certiorari should be denied.

III.

CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION BELOW WAS A PLAINLY CORRECT APPLICATION OF THE FCRA AND APPLICABLE LAW REGARDING PERMISSIBLE PURPOSES FOR WHICH A CREDIT REPORT MAY BE OBTAINED.

A. The Courts Below Correctly Concluded That Plaintiff Has The Burden Of Proof.

Korotki's statement that the District Court "reversed" the burden of proof is wrong. Petition, p. 7. The District Court correctly ruled that Korotki had the burden of proving the elements of his claims, including that the Defendants obtained his credit report for an impermissible purpose. J.A. 306. The general rule is that the plaintiff has the burden of proof and thus bears the risk of non-persuasion, absent an express provision in the substantive law creating a legal presumption in favor of the plaintiff. *Sergeant Co. v. Pickett*, 285 Md. 186, 203, 401 A.2d 651, 660 (1979); *Crowther v. Hirschman*, 174 Md. 100, 109, 197 A. 868, 872 (1938). This is similarly the case under the FCRA.

> Although we are aware of no case directly addressing who has the burden of proving reasonableness of procedures, courts have generally assumed that burden falls on the plaintiff.

Stewart v. Credit Bureau, Inc., 734 F.2d 47, 51, n.5 (D.C. Cir. 1984) (citations omitted). *See also Roseman v. Retail Credit Co., Inc.*, 428 F. Supp. 643, 646 (E.D. Pa. 1977) (the plaintiff has the burden of proving the defendant violated the FCRA).

This issue was addressed in *Stewart v. Credit Bureau, Inc., supra.* The case involved a plaintiff's claim of injury as a result of admittedly inaccurate information in his credit report allegedly due to the reporting agency's failure to follow reasonable procedures under the FCRA (15 U.S.C. § 1681e). The Court held:

> [A] plaintiff cannot rest on a showing of mere inaccuracy, shifting to the defendant the burden of proof on the reasonableness of the procedures for ensuring accuracy. There is no indication that Congress meant to so shift the nominal plaintiff's burden of proof as to requisite components of a claim based on statutory violation.

Id. at 47. Clearly, if Congress had intended to shift the burden of proof to the defendant, it could have done so.

> Congress demonstrated that it "knew how" to shift the burden from the plaintiff to the defendant by explicitly doing so in two other sections of the FCRA. See 15 U.S.C. §§1681d(c), m(c).

Stewart v. Credit Bureau, Inc., 734 F.2d at 51 n.5. In the FCRA provisions of 15 U.S.C. §§ 1681d(c), m(c), Congress demonstrated its intent to shift the burden of proof on an issue to the defendant, with clear, explicit language, as follows:

> No person may be held liable for any violation of subsection (a) of (b) of this section if he shows by a

> preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with subsection (a) or (b) of this section. 15 U.S.C. §1681d(c)
>
> No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the violation he maintained reasonable procedures to assure compliance with the provisions of subsection (a) and (b) of this section. 15 U.S.C. §1681m(c).

Section 1681b(3), which Korotki argues reverses the burden of proof, does not contain any provision even remotely similar to the provisions contained in the above statutory sections wherein Congress unambiguously shifted the burden of proof to the defendant. J.A. 311-12, Petition, p. 7. Instead, § 1681b(3) states:

> Permissible purposes of consumer reports — A consumer reporting agency may furnish a consumer report under the following circumstances and no other . . .

Nowhere in this provision does Congress state an intent to shift the burden of proof to the defendant, based on a plain reading of the statute.[2] Accordingly, the burden of proof remains on

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2. Likewise, the statutory sections that impose liability for a violation of the FCRA contain no such language:

> Civil Liability for Negligent Non-Compliance — Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to the sum of. . . .

(Cont'd)

Korotki, who must present evidence from which the trier of fact can infer that the defendant violated the FCRA provisions on which his claim is predicated. *Stewart v. Credit Bureau, Inc.*, 734 F.2d at 51. Korotki's failure to establish that the Defendants obtained his credit report for an improper purpose under the FCRA, an essential element of his case on which he bears the burden of proof at trial, renders all other alleged facts immaterial. *Celotex Corp. v. Catrett*, 477 U.S. at 322-23. Consequently, the courts below correctly concluded that the Defendants were entitled to judgment as a matter of law. *Id.*

B. Defendants Met The Requirements Of The Fair Credit Reporting Act.

The FCRA was reviewed by the Fourth Circuit Court of Appeals in *Yohay v. City of Alexandria Employees Credit Union, Inc.*, 827 F.2d 967 (4th Cir. 1987). In that case, Patricia Ryan obtained the credit report of her ex-husband to compare the list of his current credit card account numbers with the credit card account numbers that she and her ex-husband previously had established during their marriage. *Id.* at 972. Ryan did not disclose this purpose to the credit bureau. *Id.* The District Court held that Ryan had obtained Yohay's credit report for a purpose not permitted by the FCRA. *Id.* at 969. The Court of Appeals reviewed the relevant provisions of the FCRA and agreed that Ryan obtained the credit report under false pretenses. *Id.* at

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(Cont'd)

> Civil Liability for Willful Non-Compliance — Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to the consumer in an amount equal to the sum of . . .

15 U.S.C. § 1681n, o.

972. In so ruling, the Court adopted the reasoning of *Hansen v. Morgan*, 582 F.2d 1214 (9th Cir. 1978):

> [t]he standard for determining when a consumer report has been obtained under false pretenses will usually be defined in relation to the permissible purposes of consumer report which are enumerated in 15 U.S.C. § 1681b, . . .

Yohay, 827 F.2d at 971-72. Thus, Korotki must prove that the Defendants had an impermissible purpose to obtain his credit report under the language of 15 U.S.C. § 1681b.

Korotki argues that the Defendants had an impermissible purpose because he contends that the Defendants did not need Korotki's credit history. Petition, pp. 3-21. No facts are offered in support of his oft repeated argument. The record shows clearly that ASC intended to use the information that it expected to be contained in Korotki's credit report to locate a serviceable address. J.A. 744. The need for this information arose from ASC's multiple unsuccessful attempts to serve Korotki at three locations. J.A. 356-59, 760. ASC expected that the credit report would contain helpful information regarding service based on ASC's familiarity with the contents of credit reports and ASC's past successes locating a serviceable address from information contained in credit reports. J.A. 719-20, 735-37.

Korotki alleges that the District Court's ruling allows anyone asserting a monetary claim to obtain a consumer's credit report. Petition, p. 18. The District Court considered and rejected that characterization, pointing out that "asserting a monetary claim and collecting a debt are two different situations." J.A. 1344. Korotki relies on *Mone v. Dranow*, 945 F.2d 306 (9th Cir. 1991), in an attempt to show that the Defendants violated the FCRA. Petition, p. 19. However, the District Court stated

that *Mone* was distinguishable because it was based in part on a determination that *no* credit transaction took place, whereas in this case the District Court held that the "facts indicate a credit transaction." J.A. 1345.

The fact that, upon reviewing the credit report, ASC determined that it contained no useful information is irrelevant. Korotki's theory that a user only has a permissible purpose under the FCRA if, after he receives and reviews the report, it is determined that the report contains the specific permissible information that the user needed. This interpretation is flawed for several reasons. First, if the determination of a permissible purpose only can be made in hindsight, the user cannot refrain from obtaining a credit report for an improper purpose. Second, the determination of whether the user has a permissible purpose would be based entirely on matters outside of the user's control, namely, what information the credit reporting agency included in the report. If Korotki's statutory interpretation were applied, liability would hinge on irrelevant facts, in this case whether the information in Korotki's credit report actually assisted ASC to locate a serviceable address for Korotki.

There is no legal authority cited in support of Korotki's argument that, prior to obtaining Korotki's credit report, the Defendants were required to obtain report containing different or less information.[3] Petition, p. 15. No such authority exists. Where a permissible purpose is present, the FCRA authorizes the furnishing of a credit report without any further qualification. 15 U.S.C. § 1681b. Korotki is thus challenging settled law and sound application, and his effort to do so does not call for this Court's review.

3. Although there is no duty to do so, the record reflects that the Defendants obtained and reviewed various other report on Korotki, trying to locate a serviceable address, including a motor vehicle report, a judgment report, tax records and land records. J.A. 394-95, 585, 655-59.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court deny Korotki's Petition for Writ of Certiorari in this case.

Respectfully submitted,

S. TODD WILLSON
TERRI L. GOLDBERG
JULIE SEILER-MORRIS
ECCLESTON AND WOLF, P.C.
7th Floor - Scarlett Place
729 East Pratt Street
Baltimore, Maryland 21202
(410) 752-7474

Attorneys for Respondents
Thomas, Ronald & Cooper and
Daniel V. Schmitt

BENJAMIN LIPSITZ*
100 Church Lane
Baltimore, Maryland 21208
(410) 484-3050

JOEL C. RICHMOND
OFFICE OF JOEL C. RICHMOND
522 Equitable Building
10 North Charles Street
Baltimore, Maryland 21202
(410) 685-2225

Attorneys for Respondent
Attorney Services Corporation

* *Counsel of Record*